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No. 7901

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT, SALVATORE MAUGERI.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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A HISTORY OF THE CASE.

Appellant, as co-defendant with Gaspare La Rosa and Jimmie Pasqua, was charged in an indictment containing thirteen counts and returned by the Grand Jury on April 23rd, 1935, with certain violations of Sections 263 and 265 of Title 18, U. S. C. A., and with a conspiracy to violate the provisions of said sections, without specific reference to any code section.

The trial of the case before a jury was commenced on June 11th, 1935. During its progress, six of the counts in the indictment as against the defendants, Salvatore Maugeri, hereinafter referred to as the appellant, and Jimmie Pasqua, were ordered dismissed by the Court upon motion of the United States Attorney.

On June 13th, 1935, the jury returned a verdict of acquittal on six of the remaining counts of the indictment and of conviction upon one count, that in which conspiracy had been charged, in the case of appellant.

Judgment was thereafter pronounced, the Court sentencing appellant to a term of two years imprisonment in a United States Penitentiary and ordering him to pay a fine of five thousand ($5000.00) dollars.

THE INDICTMENT.

Twelve substantive offenses were charged in the indictment. They were set forth in such manner as to constitute six groups of two each; that is to say, their arrangement was in such order that, beginning with the first, each alternate count to and including the eleventh, charged all three defendants with a violation of Section 263 of Title 18, U. S. C. A., in that "in the City and County of San Francisco, State of California, within said Southern Division (of the United States District Court for the Northern District of California), then and there being (they), did then and there unlawfully, wilfully, knowingly and feloniously, with intent to defraud, the United States and certain persons to the Grand Jurors aforesaid unknown, keep in their possession and conceal a certain falsely made, forged and counterfeited obligation and security of the United States, that is to say a falsely made, forged and counterfeited obligation and security of the United States, that is to say a falsely made, forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which

said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination of ten dollars, as said defendants well knew, which said falsely made, forged and counterfeited Federal Reserve note is more particularly described as follows, to-wit (each separate Federal note description set out):

Beginning with the second count, each alternate count to and including the twelfth, charged that all three defendants violated Section 265 of Title 18, U. S. C. A., in that they did "pass, utter, publish and sell" the certain note described in each preceding odd-numbered count, "with intent to defraud the United States" and some certain different person named in each count.

Thus, while each count charged a separate offense, but six instances were alleged wherein a Federal note in question was possessed or concealed and passed or uttered.

Counts 3 and 4, 7 and 8, 11 and 12 as against appellant, Salvatore Maugeri (and defendant Pasqua), were ordered dismissed by the Court upon motion of the United States Attorney during the trial. Counts 1 and 2, 5 and 6, 9 and 10, were submitted to the jury as against appellant (and defendant Pasqua), along with count 13 which charged the three defendants with conspiracy to "keep in their possession and conceal" and to "pass, utter, publish and sell" certain "falsely made, forged and counterfeited notes purporting to be issued by a banking association, doing a banking business, authorized and acting under the laws of the United States, to-wit, the Federal Reserve

Bank of New York", etc., and which set out eight alleged overt acts.

With six of the counts dismissed, appellant was acquitted upon the remaining six substantive counts. He was found guilty alone upon the count charging conspiracy.

Defendant Jimmie Pasqua, true name Frank Scarpatura, was found guilty upon the six substantive counts submitted and upon the conspiracy count. Defendant Gaspare La Rosa had previously pleaded guilty to all thirteen counts.

ASSIGNMENT OF ERRORS.

1. The trial Court erred in refusing to grant timely motions of the appellant to strike from the record the testimony of each of the twenty-four witnesses for the prosecution upon the grounds that it was incompetent, irrelevant and immaterial and hearsay as to appellant and upon the further ground that no conspiracy had been proven in said action as against appellant.

2. The trial Court erred in refusing to grant the motion of appellant for a directed verdict of "not guilty" made at the conclusion of the government's case, thereby allowing the case against appellant to go to the jury.

3. The trial Court erred in refusing to grant the motion of appellant for a directed verdict of "not guilty" at the conclusion of all the evidence in the case.

4. The evidence is insufficient as a matter of law to support a verdict of "guilty" against defendant.

SUMMARY, OR DIGEST, OF TESTIMONY OF GOVERNMENT'S WITNESSES, CONSIDERED IN GROUPS.

Inasmuch as that twenty-four witnesses gave testimony for the government in the trial of appellant, it may facilitate matters somewhat to segregate them into the two classifications, or sets, or groups, under which it probably will be more convenient to consider their relation to the inquiry made at the trial. The first group consists of sixteen persons. We fail to find in their testimony even the mention of the name of appellant, Maugeri, nor reference to any act or word of his, however remote, either upon the dates named in any of the substance counts of the indictment or before, during, or after the indefinite period encompassed by the alleged duration of the conspiracy charged.

It is, then, within the limited group of eight witnesses, or second group, that we may analyze the testimony to ascertain, if possible, any facts that would, under the settled law, support the verdict of guilty returned against appellant upon the conspiracy charge.

Among the first, or major group, are five of those who gave testimony concerning ten of the twelve substantive charges, which we have come to consider in the light of six separate incidents or occasions, in which counterfeit notes are alleged to have been possessed or to have been passed upon various persons.

(Two witnesses, not included in this group, but in the second group, related stories concerning one incident —a sixth incident—in which a note was passed.) Three others of this major group of sixteen testified to the passing of notes at times and places not set forth in the indictment.

Not one of these eight witnesses, according to their testimony had ever seen, heard of, or talked to the appellant Maugeri. By their testimony, it can now be said that he was not present at or near the scene upon any occasion when a bill was passed. Nor is there anything in their recitals upon the stand which, in the slightest degree, suggests that the appellant here was even distantly connected with the transactions in which the notes were passed, or that he had any knowledge that they were possessed or were to be passed, that they were possessed or were being passed, or that they had been possessed or passed.

The testimony of these witnesses covers five of the occasions in which there can be no doubt from the record that counterfeit notes were passed, though not by appellant, but by others, to-wit, the defendants Pasqua and La Rosa, sometimes acting singly and in other instances together. The sixth situation covered by the indictment presents, in its analysis, the same result. The counterfeit note was passed by defendant Pasqua. Appellant was not present at the time. There is no proof that he knew the note was possessed by Pasqua, or any one, or to be passed, was possessed by Pasqua, or any one, or was being passed or that it had been possessed byPasqua, or any one, or had been passed. The two witnesses, as to this sixth incident,

who are from the smaller group of eight, did testify that they knew Maugeri, that he had been a customer at the service station where they were employed for some time previous to and subsequent to the date upon which the note was passed; that sometime previously, according to one of these two witnesses, Maugeri and Pasqua had visited the service station together; that appellant had once asked that defendants Pasqua and La Rosa be given rates for service; that appellant had frequently made purchases at the station for which he paid in coins and currency of various denominations, none of which had ever been the subject of investigation or inquiry by government authorities, or any one else, regarding the question of their genuine or spurious character and none of which was in question at the trial.

There are left, then, the other witnesses, eight from one group and six from the other, whose testimony in no way is related to the passing of or the possession of the counterfeit notes upon the six occasions enumerated in the indictment or upon three other occasions not mentioned therein, but admitted in evidence. A careful study of their testimony establishes the fact that it is as devoid as is the testimony of the others of any criminal act denounced by federal penal statutes on the part of appellant.

In the main, there are but five subject matters discussed in their testimony that could be regarded as bearing upon the guilt or innocence of appellant. The first of these is the purchase by appellant of a certain second hand Studebaker machine more than a year and a half before it is alleged the first counterfeit

note was passed and from which machine certain automobile license plates are alleged to have been taken by someone whose identity was not disclosed which later appeared affixed to a certain Essex car in which, on two occasions, appellant's codefendants were seated when notes were passed; the second is one in which appellant accompanied one of his co-defendants in the Essex car to a repair shop and ordered work done upon the car, for which he paid; the third is the purchase of an automobile tire by appellant which was later placed upon the Essex car; the fourth concerns a trip to San Mateo by appellant in his own automobile to assist one of his codefendants to place, or to have placed, upon the Essex car, an automobile tire and to follow, in his own car, the disabled Essex machine as it was being driven back to San Francisco by the codefendant; and the fifth, the association of appellant with the codefendants. On none of these occasions was a questioned note passed nor did any of the occasions occur upon a date when such a note was passed.

This summary, or digest, may simplify the endeavor to discuss the facts, with the law applicable thereto, and to isolate (or make clear) the errors committed by the trial Court as complained of by appellant.

Further Analysis of Testimony Showing Inconsistency of Verdict.

It will be remembered that six of the substantive counts, covering three of the note passing incidents were dismissed upon motion by the Government. Considered in their order they were counts 3 and 4, in the second of which it was alleged that a ten ($10.00)

dollar counterfeit note was passed by all three defendants upon a Mrs. W. F. Buchan, bakery keeper at Lyon and Fulton Streets in San Francisco; counts 7 and 8, in the second of which it was charged that a ten ($10.00) dollar note was passed upon William F. Byrnes, grocer, of 260 Octavia Street, San Francisco; counts 11 and 12, in the second of which it was charged a ten ($10.00) dollar note was passed upon Dino Chelini and Gio Risoni, employed in a restaurant on 11th Street, San Francisco.

Testimony was received by the Court as to these three transactions, as well as to the other three recited in the indictment, and the three not mentioned in the indictment, all over the objection of appellant herein, properly and timely made, as to its irrelevancy, immateriality and incompetency, its hearsay character and upon the ground that no conspiracy had been shown. We have seen that there was no evidence whatsoever connecting appellant in these three transactions, the District Attorney so admitting, even as an aider and abbettor, as an accessory, or as a conspirator, which was the promise of the United States Attorney to do (Tr. Rec. pp. 49, 50, 51 and 54), and it was proper that the charges should have been dismissed. We are forced to say, yet respectfully, that upon some incomprehensible theory the other three substantive groups (six counts) were allowed by the Court to stand despite appellant's objections and were submitted for the consideration and judgment of the jury when, upon an examination of the record and under any hypothesis or basis or reasoning, it must be plain that no more evidence was adduced against appellant

upon the substantive counts retained than upon those rejected. By no process of sound reasoning can it be maintained that appellant should have his liberty jeopardized in the one instance and be relieved of such jeopardy in the other, where basically and in detail there was no distinction to be made in the character, weight or legal sufficiency of the evidence.

Since the jury found appellant utterly guiltless under the substantive charges submitted by the Court, there is ample and added justification for this contention. The jury determined by its verdict that appellant was neither aider, abettor nor accessory in the passing of or possession of the counterfeit notes involved in the six counts submitted, as the Court had found in the case of the other six counts. It would require more restraint than is here commanded to refrain from commenting upon the obvious fact that, since appellant was convicted alone upon the conspiracy charge, the submission of the substantive charges for the deliberation of the jurors, in all human likelihood, caused prejudice in the minds of the jurors to an extent where appellant's liberty became the sacrifice under the conspiracy charge. Had appellant's motions, first to exclude and later to strike from the record the testimony adverted to, been granted, as the Court, appellant contends, in error refused to do, appellant would not have had to suffer the effect of having his case considered by the jury in light of the apparent concurrence by the Court in the position of the United States Attorney that evidence of aiding and abetting the guilty parties had been indulged in by appellant in several instances precisely similar to

those in which, for some reason, the Government was willing to confess no case had been made against him.

Attention is directed to the testimony of Mrs. Jewell Simpson (Tr. Rec. beg. p. 49); Earl Roberts (Tr. Rec. beg. p. 55); Clarence Smith and Henry D. Apparius (Tr. Rec. beg. p. 62 and Tr. Rec. p. 66). These are the witnesses who testified to support the substantive charges submitted to the jury. Comparison of their testimony with that of Mrs. W. F. (Alma) Buchan (Tr. Rec. beg. p. 60); Mrs. W. F. (Betty) Byrnes (Tr. Rec. beg. p. 59) and Tony Rosini (Tr. Rec. beg. p. 70), will show appellant to have been just as guiltless in the transactions of note passing described by the first four witnesses, used to establish the substantive counts ordered submitted, as in those dismissed, yet with the Government admitting failure of proof in the one set of circumstances, the Court, over objection of appellant, conceded the Government's demand to subject the appellant to unnecessary risk of a priceless possession upon like insufficient proof under another set of circumstances and exposed him to the element of prejudice which such erroneous rulings created. The mere fact that the jury held views different from those of the Government and the Court as to the insufficiency of this evidence, does not alter the situation in any particular concerning the prejudice which undoubtedly attached in the minds of the jurors to the degree that it could have, and undoubtedly did, influence their decision upon the question of appellant's participation in a conspiracy.

Although the rule is here recognized that a defendant, under such circumstances, may not have participated in the commission of a so-called substantive offense and that he may yet have conspired with others who were the actual perpetrators of the offense, contemplation of the inconsistent and anomalous verdict rendered in appellant's particular case cannot be avoided. On the one hand it was declared by the verdict that appellant did not aid, abet, accede to or participate in any way in the passing of the notes, which in itself is a declaration that he had no knowledge that notes were possessed or were to be passed, were possessed or were being passed or had been possessed or passed, and on the other hand, by some blanket process of deduction, offensive to the accepted rules of logic, the jury resolved that appellant conspired with those whom he neither aided, abetted, counselled or joined in their enterprises. It is not possible to abet another in the doing of a thing without knowledge of the thing to be done. It is not possible, as a matter of law, to conspire to do a thing without knowledge of the thing to be done. The jury found that appellant did not abet the codefendants who committed the wrongful acts in this case, determining that he knew nothing of their acts, while they indulged in the inconsistency of determining that he conspired with them, which implies knowledge.

Before dismissing this phase of the case, it seems necessary again to refer to the rulings of the trial Court admitting in evidence, over objection of appellant, the testimony of the witnesses who told of the three transactions concerning the passing of notes

upon which the indictment was silent. These witnesses are John Lytle (Tr. Rec. beg. p. 73); Ivan Barrett (Tr. Rec. beg. p. 75) and Ellsworth J. Ramos (Tr. Rec. beg. p. 77). In each instance, the witnesses identified appellant's two codefendants as having passed the spurious notes. They never mentioned appellant. In each case, appellant's two codefendants occupied a certain Hupmobile automobile which had been purchased according to the testimony of William H. Bailey, alone by defendant Jimmie Pasqua, true name Frank Scarpatura. Bailey never mentioned appellant. Certainly, there being no syllable in the record to connect appellant with the purchase of, the knowledge of the existence of, or the use of the Hupmobile machine for any purpose, legal or otherwise, it becomes most perplexing to understand how this testimony became relevant or admissible against appellant upon any theory. No conspiracy had been shown. It surely did not support the theory of the Government that appellant had aided or abetted the commission of any substantive offense charged. But nevertheless, it was admitted, and it must be plain that appellant suffered prejudice thereby.

RECORD SHOWS THEORY UPON WHICH GOVERNMENT PRESENTED CASE AGAINST APPELLANT.

It will be observed from the record that the United States District Attorney, following objections and the motion to strike during the giving of the testimony of Mrs. Jewell Simpson, the first Government witness, declared definitely that he would "connect" the

testimony by other evidence against appellant "as an aider and abettor" ("aider and abettor" used in the conjunctive); "that appellant was an accessory" and, that the Government was "going to prove the conspiracy charge" (as against appellant). This was the announced theory upon which the Government presented its case.

Here is the record (Tr. Rec. pp. 49, 50, 51 and p. 54):

(Testimony of Mrs. Jewell Simpson.)

"Mr. Brennan. 'Now, if your Honor please, I move that the testimony of this witness, as far as the defendant Maugeri is concerned, be stricken from the record, upon the ground that it is immaterial, irrelevant, and incompetent, and hearsay as to the defendant Maugeri.'

Mr. Hammack. *'I will say that the same will be connected up later.'*

The Court. *'You will make the assurance you will connect it up by other evidence with the defendant Maugeri?'*

Mr. Hammack. *'Yes, as an aider and abettor.'*

Mr. Brennan. 'May I make the further objection that no conspiracy has been established.'

The Court. 'Of course, I have the assurance of the United (40) States District Attorney that he will connect it up; all the evidence cannot be put on at once; it is only a matter of order of proof. I have a right to receive the proof upon the assurance of the District Attorney that he will connect it up. Of course, if he fails you are in a position then to renew your motion to strike at the conclusion of the trial.

At this time I will deny the motion upon the assurance. *I presume that you also give the assurance that you are going to prove the conspiracy charge.'*

Mr. Hammack. *'Yes.'*

Mr. Brennan. 'Of course, with perfect respect for the Court and its ruling, might I suggest that no reference has been made in the testimony of this witness whatsoever to the defendant Maugeri.'

The Court. 'The point is this, the Government is trying to present its case on the first count. The first count gives the number of a bill similar to the one that has been offered for identification. It is simply a matter of proof, and if the Government fails to put in sufficient evidence upon which the connection is made your motion to strike out would have to be granted, but at this time I cannot grant it, *because I have to give the United States Attorney a chance to establish, if he can establish by such evidence in his hands, in the substantive counts that your client was an accessory,* and *in the conspiracy count he was one of the conspirators.'*

Mr. Brennan. 'Might my motion run both to the indictment in its entirety, and as to counts 1 to 12 in particular, and count 13 in particular?'

* * * * * * *

(Page 54.)

Mr. Brennan. 'No question on behalf of the defendant Maugeri. At this time if your honor please, I renew my motion or rather make my motion with reference to the testimony of the witness Blach, who just left the stand as I did upon the occasion of (43) the witness Simpson, first on the stand. No mention

having been made of the defendant Maugeri in the testimony of the last witness, and I make the motion upon the grounds that have been heretofore mentioned by me.'

The Court. *'I presume that this evidence is directed to the conspiracy count?'*

Mr. Hammack. *'Yes, directed to the conspiracy and aiding and abetting, and will properly be connected up with the substantive count.'*

The Court. 'I will deny your motion at this time.'

Mr. Brennan. 'May we have, respectfully, an exception?'

The Court. *'I will not be able to pass upon this until such time as the United States Attorney advises me he has presented all the evidence for the purpose of connecting it up.'"*

The record further shows that the same objections by appellant ran throughout the case as to each witness and that the testimony was admitted upon the same theory by the Court and under the same promise by the District Attorney to connect all the testimony in such manner as to establish the proof that appellant both "aided and abetted" *and* "conspired" *to commit the offenses alleged in the thirteen counts of the indictment.*

THE LAW.

Appellant is held guiltless on all of the first twelve (substantive) counts, six of which were dismissed upon the Government's motion, after jeopardy had attached, and six of which resulted in the jury's ver-

dict of acquittal. It is therefore judicially established that appellant did not commit the unlawful acts thus complained of, that he was not present, either actually or constructively, when they were committed, and that he did not counsel, encourage, incite, instigate, participate in, accede to, have knowledge of their commission, or give aid or comfort to their perpetrators, either before they were committed, while they were being committed or after they were committed. In absolving appellant under the first twelve counts, the Court and the jury determined that he had no knowledge of the criminal acts of the others. If he had no knowledge of the acts, he did not nor could not have conspired with them.

Mr. Justice Hart, in the case of *People v. Yee,* 37 Cal. App. 579 (174 Pac. 343), at pages 583 and 584, very lucidly and unmistakably lays down the rule that is universally recognized in the authorities, as follows:

> "But, as will be observed, the Court followed the language thus referred to with the statement that, to justify a conviction of one who did not himself actually commit the criminal act, it must be shown that he aided, assisted *and* abetted therein, the word 'abetted', unlike the words immediately preceding it, including *'knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime'* (People v. Dole, 122 Cal. 486; People v. Bond, 13 Cal. App. 175, 185, 109 Pac. 150). Thus the rule was clearly and correctly stated to the jury, and it cannot be doubted that they well understood from it that, *to warrant the conviction of a person who did not himself actually commit a crim-*

inal act, it was requisite to show that he abetted, or what is the equivalent in legal signification of that word, criminally or with guilty knowledge and intent aided the actual perpetrator in the commission of the act" (italics ours).

In *People v. Dole,* 122 Cal. 175, at pages 184, 185, the Court defines the word "abet":

> "The word 'aid' does not imply guilty knowledge or felonious intent, whereas the word 'abet' includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime."

Quoting from the case of *State v. Talley,* 102 Ala. 25 (15 South. 722, 737), the California Court of Appeal said in *People v. Bond,* 13 Cal. App. 175, at page 185:

> "The legal definition of aid is not different from its meaning in common parlance. It means to assist, 'to supplement the efforts of another' (Rapalje and Lawrence's Law Dictionary, p. 43). 'Abet' is a French word compounded of the two words 'a' and 'beter'—to bait or excite an animal; and Rapalje and Lawrence thus define it: 'To abet is to incite or encourage a person to commit a crime.' An abettor is a person who, being present in the neighborhood, incites another to commit a crime and thus becomes a principle in the offense."

In *Bradley v. Commonwealth,* 257 S. W. 11, 13, 201 Kentucky 413, the Court held that

> "to constitute one an 'aider' or 'abettor' in the commission of a crime he must be actually or constructively present at the time of its commis-

> sion and participate in some way in the act committed. It is not essential that there should be a prearrangement or mutual understanding, or concert of action, but in the absence of these, it is essential that one so charged should in some way, *either by overt act* or *expression of advocacy or sympathy, encourage the principal in his unlawful acts.*"

State v. Powell, 83 S. E. 310, elucidates the point still further.

We find in 7 *Cal. Jur.* 889, this note:

> "The word 'aid' does not imply guilty knowledge or felonious intent, whereas the word 'abet' *includes knowledge of the wrongful purpose of the perpetrator, and counsel and encouragement in the crime*" (italics ours).

The following cases are cited:

People v. Morine, 138 Cal. 626, 72 Pac. 166;
People v. Yee (supra);
People v. Bond (supra);
People v. Lewis, 9 Cal. App. 279, 98 Pac. 1078.

Other authorities, too numerous to mention, hold that *one cannot "abet" a person in committing an act without knowledge of what is to be done.*

Now we come to one of the best considered cases upon the subject of conspiracy that the authorities afford. It is the case of *Lucadamo v. U. S.,* 280 Fed. 653, where the Court, at pages 656 and 657, clearly and correctly defining the crime of conspiracy, says:

> "The elements of the crime (conspiracy) are: First, an object to be accomplished which must be, in this instance, the commission of the offense

against the United States; Second, an agreement or understanding between two or more persons, whereby they become committed to co-operate for the accomplishment of the object by means embodied in the scheme or by any effectual means, and a place or scheme embodying means to accomplish the object; Third, an overt act by one or more of the conspirators to effect the object of the conspiracy. It was sufficient to submit the evidence to the jury, since it appeared that the jury might find that the minds of the parties met understandingly, so as to bring about an intelligent and deliberate agreement to do the acts and commit the offense charged. *A defendant can be guilty of committing an offense, by consenting thereto, only where his consent is of that affirmative and express character which amounts to counselling, aiding and abetting in the commission of the offense.* Woo Wai v. U. S., 223 Fed. 412, 137 C. C. A. 604.

Unless the scheme, or some proposed scheme is in fact consented to or concurred in by the parties in some manner, so that their minds met for the accomplishment of the proposed unlawful act, there is no conspiracy. United States v. Cole (D. C.), 153 Fed. 803. So that mere knowledge, or approval of the act, without co-operation or agreement, is not enough to constitute a party to a conspiracy (Patterson v. U. S. 222, Fed. 599, 133 C. C. A. 123). To constitute a party to a conspiracy, the evidence must show an intentional participation in the attempt to commit the offense. Marrash v. U. S., 168 Fed. 225, 93 C. C. A. 511" (italics ours).

The *Woo Wai* case, cited in the *Lucadamo* decision, was decided by the Honorable Court of this district.

It holds that knowledge is necessary to establish the charge of conspiracy.

In the instant case, the Government was allowed by the Court to develop all of its proof, over objection, as to each detail of the twelve substantive charges and as to the conspiracy. Under the rulings of the Court and under the declared theory of the United States District Attorney all the testimony went to prove all the charges. The Government confessed its failure as to six of the substantive charges, but insisted that the evidence as to the other six of the first twelve charges, precisely similar, be submitted to the jury along with the conspiracy charge, which the Court ordered.

It would have been impossible for the jury to have considered the evidence as to the substantive charges, without considering the evidence as to the conspiracy charge, and vice versa. All evidence independent of the possession, concealing, passing or uttering the counterfeit notes bore a relation to the other evidence offered to prove conspiracy, since, in this case, all of the unlawful acts of possession and passing given for the consideration of the jury were actually committed by either one or both of appellant's two codefendants. No unlawful act was relied upon to prove conspiracy that was not included in what the Government offered as proof of the substantive offenses. Testimony as to three other transactions where notes were passed by these two, and not stricken out upon appellant's motion, showed the acts to have been done without the remotest knowledge or participation of appellant, with no possible connection of his, and at a time when

the codefendants appeared at the scenes of the offenses in a certain Hupmobile automobile, the very existence of which, so the record shows, appellant was wholly ignorant of—had never seen, heard of or ridden in nor been near. Neither was he at or near the scenes of the note passing in these three instances, or in any instance. And, again, not the slightest evidence appears in the record that he even knew the two codefendants were to be at any of the places named on their nefarious errands.

So, it must follow, that when the jury acquitted appellant on the six substantive charges, the Court having dismissed the other six, it stood adjudicated: first, that appellant was not present, actually or constructively, when the crimes of possessing or passing counterfeit notes were committed by others; second, that he did not aid, abet, counsel, encourage, instigate, inspire, suggest or comfort the criminals in their acts by any act, word or deed of his; *third that he did not have knowledge of their acts or their intentions before, during or after the commission of the acts.*

Any testimony sufficient to warrant a conviction on the conspiracy charge, was likewise, in this case, sufficient upon which to base a conclusion that appellant aided in and abetted, or aided in or abetted, the unlawful acts. All of the evidence was as applicable to the one set of charges as to the other charge. The same legal requirements applied in the one instance, *in this particular case,* as in the other instance. To be guilty of conspiracy, appellant must have been guilty of aiding and abetting the guilty parties, with, of course, *knowledge of their plans or*

schemes, as the Government contended in its case. To have been found innocent upon the one theory, where knowledge or participation was the same requisite, bespoke appellant's innocence under the other, or consistency and reason have gone from the law.

DISCUSSION OF TESTIMONY RELATIVE TO OVERT ACTS.

We have seen that no evidence offered against appellant, and admitted in the first instance only upon the theory that the order of proof might be determined by the Court, and so being admitted, would be "connected up" (Tr. Rec. p. 50, lines 18 and 19) by the District Attorney against appellant as an "aider and abettor" (conjunctive) (Tr. Rec. p. 50, lines 9 and 10), as "an accessory" and as "one of the conspirators" (Tr. Rec. p. 51, lines 10 and 11), was sufficient to convict him as either a principal or aider and abettor. What, then, of the evidence other than the direct testimony concerning the possession and passing of the notes, bearing only upon the acts of the codefendants? Could it, if detached (even if it were possible so to do in this case), be sufficient to establish conspiracy? A review, as brief as possible, will be sufficient to answer the question.

Appellant purchased a second hand Studebaker automobile on June 1st, 1933, for "some relative or somebody out of town" (Tr. Rec. p. 84, line 28). In 1934, this car was registered under California State license 3-J-826 with J. Dominec, 155 Lighthouse Ave., Santa Cruz, California, as the owner. These premises were owned by "S. Maugeri", although appellant was

not identified as this person, there being but the similarity of names (Tr. Rec. p. 57). On September 11th, 1934, more than fifteen months later, this Studebaker car, belonging to Dominec, was completely wrecked in an accident and on November 18th, 1934, thirty-eight days subsequent, it was taken by a junkman, in payment, no doubt, of his towing fee. The 1934 number plates were missing from the wrecked car. An Essex coupe, bearing California license number 3-J-826, and occupied by Gaspare La Rosa and Jimmie Pasqua, true name Frank Scarpatura, was driven into a service station at El Cerrito, Contra Costa County, California, on November 18th, 1934. La Rosa passed a ten ($10.00) dollar counterfeit bill on the attendant.

On November 17th, 1934, an Essex car, was driven into a San Francisco repair shop. Appellant and Pasqua were seated in it. Repairs were ordered and done. Four or five days later Pasqua returned the car for some minor work and two weeks or more later, appellant and another man, not identified in the trial, again called at the repair shop with the Essex, appellant saying a bearing had burned out. A tire blew out as the car was leaving the shop. The repair bills were paid by Maugeri. The repair man, who knew Maugeri, did not identify him as the owner of the car, saying he did not know who owned it. Ownership of the car was never proved by any evidence in the case. Gaspare La Rosa drove an Essex car into a service station on Bayshore Highway, San Mateo County, California, on November 28th, 1934. Its motor was noisy, it had a blown tire and the attendant

testified it was in such condition he thought "it would not get very far". Pasqua and La Rosa were in the car. Two days later appellant and La Rosa called at the station in a Studebaker sedan car, produced a tire which appellant had previously bought and they placed it on the car. This operation required some time. La Rosa drove the Essex car, disabled, toward San Francisco at a slow speed and appellant followed in his Studebaker, stopping twice at least and looking back down the road on one occasion. Secret service agent Geaque and a fellow officer observed the Essex car on another occasion driven by Pasqua when a tire blew out on a street in San Francisco. At the time appellant was in the vicinity in his Studebaker car.

On none of these occasions touching upon the repair of the car, the purchase of tires and the like is there any evidence that a counterfeit note was passed by anyone or that appellant ever heard of or saw one or discussed one with either of the codefendants. Geaque on other occasions saw Pasqua and appellant together. On the night of December 27th, 1934, Geaque saw La Rosa and Pesqua leave appellant's house together.

These are substantially all of the other facts in the case, testified to principally by witnesses included in the smaller group of eight witnesses which, at the beginning of this brief, was here formed for the purpose of better understanding the testimony. It will be seen that there is no connection with appellant upon any date upon which a counterfeit note was passed anywhere by the codefendants in the case.

If any act done by appellant as related by the testimony just considered is to be regarded at all in

this case it must, we contend, be taken in the light of his innocence with which the law, throughout the trial, clothed him. No one of the acts, nor all of them together, is sufficient to proclaim his guilt. There is none which is not susceptible of the interpretation of innocence rather than of guilt, and the settled law fixes it as the duty of both the Court, in the first instance, and the jury, next, so to determine. There is none which could be regarded as furthering any of the acts in the substantive counts, with knowledge, since we know by the Court's dismissals and the jury's acquittals under the aiding and abetting theory, that he had no knowledge of any such acts, or intended acts.

It is necessary here to emphasize that the license plates said to have been on the Studebaker car wrecked at Santa Cruz in September, 1934, and bearing the California number 3-J-826 were 1934 license plates and were registered to the owner, one Dominec. The car had been purchased by appellant sixteen months before, in June, 1933. There is not a word in the record that appellant ever saw or heard of the car again, either before or after it was wrecked. He did not live in Santa Cruz, but in San Francisco, with his family, and the record does not disclose that he ever visited Santa Cruz in all that time for any purpose. He could not have known what the 1934 license was, as far as the record goes, and even if the record showed that he knew that the license 3-J-826 was on the Essex car in question, he could not have known that it was from another car which he had not seen since six months or more before the 1934 licenses were

required by California law to be affixed to automobiles in use in the State. How the license plates in question came to be on the Essex car was not determined or suggested by any evidence in the case, and it cannot, as a matter of law, be merely guessed that appellant caused them to be put there, or that he knew that they were there.

That appellant knew La Rosa and Pasqua there can be no doubt, but that fact, or his association with them on several occasions, imports no guilt to him under the law. Mere association is not an element sufficient to prove conspiracy.

Nor is the fact that he paid for the repair of the Essex car sufficient evidence, even taken into consideration with the other facts, upon which to found his guilt when the act performed by him may quite as well have been done innocently as with guilty knowledge of, or in aid of, the unlawful operations of those with whom he was when the work was ordered. The purchase of the tire and the assistance he rendered in having it affixed to the disabled Essex in San Mateo are likewise acts which the law compels to be regarded under the hypothesis of innocence.

LEGAL ARGUMENT IN SUPPORT OF FOURTH ASSIGNMENT OF ERROR.

No act of appellant shows his knowledge of a criminal scheme or plan on the part of others, even though we acknowledge the rule that circumstantial evidence may establish guilt in conspiracy cases. The

more jealously guarded principle of the presumption of innocence, which must be overcome by evidence excluding every reasonable doubt, prevails. It is well within the bounds of reason to deduce that appellant was actuated by motives other than those precluding every hypothesis than that he acted with guilty knowledge or guilty participation in a scheme to violate the law.

In *United States v. Lancaster,* 44 Fed. 896, 904, the following sound observation is made, too often repeated in the authorities to bring into question its elementary character:

> "It is also true, in cases of conspiracy, as in other criminal cases, that the prisoner is presumed to be innocent until the contrary is shown by proof; *and where that proof is, in whole or in part, circumstantial in its character, the circumstances relied upon by the prosecution must so distinctly indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the prisoner's innocence"* (italics ours).

It is not necessary to leave our own circuit, the Ninth, to find the principle well considered and applied with approval. In the case of *Sugarman et al. v. United States,* 35 Federal, second, 663, at page 665, a conspiracy case, in a situation which undoubtedly is more cogently persuasive of circumstantial implication, the Honorable Court said:

> *"The testimony tending to connect the appellant Williams with the offense is inconclusive and unsatisfactory.* He was referred to on different occasions as one of the parties employed by the

conspirators in the transportation of liquor from boats offshore to land, but this testimony was not sufficient to connect him with the conspiracy, and was not competent for that purpose. It further appeared that he operated a boat which was later destroyed by fire, and it is claimed that this boat was employed for the purpose of transporting liquor to the shore, but this likewise appears only from statements of one or the other of the conspirators. The boat to which we have referred was searched on two different occasions by one of the officers of the Coast Guard, while operated by Williams, but no intoxicating liquor was found. At the time of his arrest Williams was in company with one Rasmussen, an alleged conspirator who died before the trial. Rasmussen had on his person at the time of his arrest a receipt given for a part payment on the purchase price of the boat which brought the liquor into the United States, as charged in the third count of the indictment, and no explanation of such possession was offered. At the time of his arrest Williams gave a fictitious name, and removed the coat he was wearing, replacing it with another. The coat thus removed was offered in evidence, and corresponds in texture with a pair of pants found in the boat which had been abandoned while attempting to introduce intoxicating liquor into the United States, as already stated. *It will thus be seen that the only competent testimony tending to connect the appellant Williams with the commission of the offense was the company he was found in, the giving of an assumed name at the time of his arrest, and the unexplained possession of a coat comparing in texture with a pair of pants found in an abandoned boat. Whatever suspicion these facts may give rise to, they are in*

our judgment legally insufficient to support a verdict of guilty" (italics ours).

And in the next case following in 35 Federal, second, that of *Chin Wan et al. v. United States,* the same Court repeats its judgment concerning the defendant, Tom Lett, whose conviction was under circumstances again infinitely stronger than those shown in the case of appellant here. Lett had driven a machine transporting narcotics to an express office, had given the package to another directing him to take the package into the express office and to do as he had been told. Mr. Justice Rudkin, again writing the decision, concurred in by Mr. Justice Dietrich and Mr. Justice Wilbur, as in the *Sugarman* (Williams) case, said:

> "As to appellant Lett, the case is entirely different. His only connection with the transactions involved in this appeal was as above set forth. It was not shown that he had any knowledge of the contents of the box transported by him, or of the criminal purposes of the other parties. He simply drove the automobile containing the box to the express office at the request of the witness La Rosa, aided him in removing the box from the automobile, told him to do as instructed, and refused to wait for him at the express office when requested to do so. As said in Sugarman v. United States (C. C. A. 5915), 35 F. (2nd) 663, just decided: 'Whatever suspicion these facts may give rise to, they are in our judgment legally insufficient to support a verdict of guilty'. Had Lett been an expressman or taxi driver of good repute, such circumstances would scarcely give rise to a suspicion against him."

In *Dickinson v. United States,* 18 F. (2nd) 887, at 893, we find:

> "Whenever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible. To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offence which is the object of the conspiracy; there must be proof of the unlawful agreement, either express or implied, and participation with knowledge of the agreement."

Citing:

Linde v. United States, 3 Federal (2nd) 59;

United States v. Heitler, 274 Federal 401;

Stubbs v. United States, 249 Federal 511 (Ninth Circuit);

Bell v. United States, 2 Federal (2nd) 543;

Allen v. United States, 4 Federal (2nd) 688;

United States v. Cole, 153 Federal 801-804;

Lucadamo v. United States, 280 Federal 653, 657.

(Ninth Circuit). In *Haning v. United States,* 21 Federal (2nd) 508-509:

> "When all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of guilty."

Other cases to the same effect are:

Vaccario v. United States, 13 Federal (2nd) 678;

La Rosa v. United States, 15 Federal (2nd) 479;

Coleman v. United States, 11 Federal (2nd) 601;
Lewis v. United States, 11 Federal (2nd) 745;
Dow v. United States, 21 Federal (2nd) 816;
DeLucca v. United States, 298 Federal 412-413;
Tofanelli v. United States, 28 Federal (2nd) 581 (Ninth Circuit).

There are many others, but we quote *Salinger v. United States,* 23 Federal (2nd) 48, at 50:

> "Unless there is substantial evidence of facts which exclude every hypothesis but that of guilt it is the duty of the trial Court to instruct the jury to return a verdict for the accused, and where all the evidence is consistent with innocence, as with guilt, it is the duty of the Appellate Court to reverse a judgment against the accused."

In *Benn v. United States,* 21 Federal (2nd) 962, the Court observed:

> "It is highly important, of course, that this and all other criminal laws should be strictly enforced, *but it is of far greater importance that a citizen should not be imprisoned and deprived of his liberty under a judgment based on no surer foundation than mere guess work and speculation."*

The case of *Weiner v. United States,* 282 Federal 799 contains this language:

> "If the evidence is as consistent with the theory that the opium was stolen as it is with the theory that it was not stolen, the motion for bind-

ing instructions, for the reason that the allegations in the indictment had not been proved, should have been granted, and defendants' first point, that they could not be convicted under the evidence in the case, should have been affirmed. Every person is presumed to be innocent until his guilt is proved beyond reasonable doubt. The presumption of innocence is evidence in favor of the accused, introduced by the law, in his behalf. This principle is 'axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'

'It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman.' Coffin v. U. S., 156 U. S. 432, 453, 456, 15 Sup. Ct. 394, 404 (39 L. Ed. 481).

'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial Court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment of conviction.' Union Pacific Coal Co. v. U. S., 173 Fed. 737, 740, 97 C. C. A. 578, 581; Wright v. U. S., 227 Fed. 855, 857, 142 C. C. A. 379.

In the case of Hart v. U. S., 84 Fed. 799, 808, 28 C. C. A. 612, 621, Judge Acheson, of this court said:

'Now it is a familiar rule in criminal cases that, to justify a conviction upon circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.'

* * * * * * *

We are of the opinion that, under all the evidence in the case the defendants should not have been convicted of conspiracy as charged in the indictment" (judgment reversed).

CONCLUSION.

Can it be said here that, at the very most, there is aught but suspicion that appellant had knowledge of the unlawful enterprises of La Rosa and Pasqua? Is the judgment of conviction more than mere guesswork and speculation? Is there a single act of his, taking into consideration any of the overt acts alleged, that is not easily subject to an innocent interpretation, even though it might be said, which is not admitted, that any one or all of them had some color of guilt? The record is barren of any proof that he participated in the commission of any crime. The element of participation is entirely lacking. Mere association with two men who were committing crimes would not be adequate upon which to base a pronouncement of guilt. It would not of itself imply knowledge of their activities in violation of the law. Nor would any act of appellant, admitted in evidence, all remote from the instances in which crimes were committed by the others, remove him from the protection of the fixed measure of the law laid down by the Courts that those acts must be seen in the light of and under the presumption of his innocence, unless they permit of no other interpretation than that of guilt. Even if it is contended that appellant's acts circumstantially point to a guilty knowledge or

participation, is it not true under the *Lancaster* case (supra), that:

> "The circumstances relied upon by the prosecution must so distinctly indicate the guilt of accused as to leave no reasonable explanation of them which is consistent with the prisoner's innocence"?

So, then, appellant respectfully urges that he was entitled, first, to an order from the trial Court upon his motions, directing the jury to acquit on all counts remaining after the six were dismissed, the conspiracy count included, and, that failing, to his acquittal because of the insufficiency of the evidence to meet the legal requirements.

Appellant's failure to take the stand, was, of course, his constitutional right.

Appellant submits that the errors complained of were committed by the trial Court and that the evidence against him was insufficient to warrant his conviction as a matter of law.

Dated, San Francisco,
September 20, 1935.

Respectfully submitted,
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